No. 86-1257

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In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES E. SMITH AND LELAND E. STEVENSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the version of 18 U.S.C. (Supp. II) 2252(a) that applied between 1984 and 1986, which proscribed the interstate transportation or mailing of "any visual depiction" of minors engaged in sexually explicit conduct, prohibited the transportation or mailing of undeveloped film.

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner Smith's conviction (Pet. App. 1-18) is reported at 795 F.2d 841. The order of the court of appeals affirming petitioner Stevenson's conviction (Pet. App. 30-31) is unreported. The opinion of the district court denying the motion to dismiss Stevenson's indictment (Pet. App. 20-29) is also unreported.

JURISDICTION

The judgment of the court of appeals affirming petitioner Smith's convictions was entered on July 29, 1986. A petition for rehearing was denied on October 30, 1986 (Pet. App. 19). Smith's petition for a writ of certiorari was therefore due, under Rule 20.1 of the Rules of this Court, on December 29, 1986. The petition was filed as of January 2, 1987, without a notarized statement of a member of the bar

of this Court as described in Rule 28.2 of the Rules of this Court. It is therefore out of time. The judgment of the court of appeals affirming petitioner Stevenson's conviction was entered on December 10, 1986. Accordingly, with respect to Stevenson, the petition for a writ of certiorari was timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the District of Hawaii, petitioner Smith was convicted on three counts of coercing minors to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, knowing that such visual depictions would be transported in interstate commerce and mailed, in violation of 18 U.S.C. (Supp. II) 2251(a). He was also convicted on three counts of mailing those visual depictions, in violation of 18 U.S.C. (Supp. II) 2252(a)(1), and one count of possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to ten years' imprisonment on one of the Section 2251 counts, to be followed by a five-year probationary term imposed on the remaining counts. He was also assessed $50 on each count pursuant to 18 U.S.C. (Supp. II) 3013.

The evidence at trial showed that in 1984 Smith photographed three girls, aged 13 and 14, in various stages of nudity. He mailed the undeveloped film from Hawaii to a photo company in Maryland for development. After developing the film, the company contacted United States Postal Service inspectors, who consulted a pediatrician to confirm that the girls were under the age of 18. Pet. App. 2.

The court of appeals affirmed Smith's convictions on all counts (Pet. App. 1-18). With respect to the three counts charging the mailing of visual depictions of minors engaging in sexually explicit conduct, the court held that the term

"visual depiction" as used in the statute encompasses undeveloped film. Pet. App. 5-7. The court noted that the 1984 version of the statute did not define "visual depiction." The court held, however, that it would be inconsistent with Congress's intent to construe "visual depiction" to exclude undeveloped film, since "the undeveloped state of the film does not eliminate the harm to the child victims in the film's production or the incentive to produce created by the film's trafficking" (*id.* at 7).

The court also concluded that the statute was not unconstitutionally vague. Pet. App. 7-8 n.4. The court observed that Section 2251 plainly forbids "the condition precedent of the undeveloped film, the actual inducement of minors into the sexually explicit conduct to be photographed" (Pet. App. 8 n.4). And Section 2252 unquestionably prohibits "the mailing of negatives and prints, the logical consequence of mailing undeveloped film to a processor" (Pet. App. 8 n.4). Accordingly, the court reasoned, "no person 'of common intelligence' would need to 'guess' that the intermediate step, the actual mailing of the undeveloped film, was also prohibited" (*ibid.*).

2. Petitioner Stevenson entered a conditional guilty plea in the United States District Court for the Central District of California on one count charging him with the interstate transportation of 30 rolls of undeveloped eight-millimeter film and five rolls of undeveloped Kodak film depicting minor children engaged in sexually explicit conduct, in violation of 18 U.S.C. (Supp. II) 2252(a)(1). He was sentenced to five years' imprisonment, and he was assessed $50 pursuant to 18 U.S.C. (Supp. II) 3013.

A stipulation of facts between Stevenson and the government stated that the films in question depicted sexual activity between Stevenson and young boys of East Asian descent. The photographs and films had been taken on Stevenson's recent trip to Sri Lanka and India, and he had

transported the undeveloped film back to his home in Nevada. In January 1985 he drove the rolls of film to Hollywood, California, where he dropped them off at a laboratory for processing. When the laboratory developed the film and discovered the subject matter, it contacted the Los Angeles Police Department. Stevenson was arrested after he picked up the developed movies and photographs from the laboratory. Pet. App. 21-22.

Stevenson moved to dismiss the indictment on the ground that the statute did not prohibit the transportation of undeveloped film. The district court denied the motion to dismiss (Pet. App. 20-29). The court held that the term "visual depiction" encompasses undeveloped film. The court reasoned that Stevenson exposed images onto the film with the intent to develop the film, and that the process therefore fit within the dictionary definition of "visual," which is "of or pertaining to seeing or sight" (*id.* at 23).

The district court also found that the legislative history of Section 2252 showed that Congress intended to punish the interstate transportation of undeveloped film. Prior to 1984, the statutory scheme used the phrase "visual or print medium" rather than "visual depiction." The court observed that "[e]xposed, but undeveloped film is a medium for the creation of visual images, and thus clearly covered by the language of the prior act" (Pet. App. 24). Congress amended the Act in 1984 and, the court observed, "the thrust of the 1984 amendments * * * was to expand coverage of the laws against child pornography" (*id.* at 28-29). Accordingly, the court concluded, if the former version of the statute encompassed undeveloped film, then Congress must have intended to cover undeveloped film in the 1984 version of the statute (*id.* at 24-26).

The district court rejected Stevenson's argument that the statute did not give him fair notice that his conduct was criminal. The court observed that Stevenson had engaged in

sex with children under the age of 18; he had recorded those activities on film; he had traveled across state lines to develop the film using an alias; and he had intended to return to Nevada with the developed film. Pet. App. 28. The court further noted that sex with minors is a crime; photographing sex with minors is a crime; transporting child pornography is a crime; the obscenity statutes apply to undeveloped film; and negatives are within the ambit of Section 2252 (Pet. App. 28). Therefore, at the very least, Stevenson " 'deliberately [went] perilously close to an area of proscribed conduct' and assumed the risk that he might cross the line" (*ibid.*, quoting *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952)).

The court of appeals affirmed Stevenson's conviction on the basis of its prior decision affirming Smith's conviction (Pet. App. 30-31).

ARGUMENT

Petitioners first suggest that exposed but undeveloped film is not a "visual depiction" as that term was used in the 1984 version of Section 2252(a)(1). They contend that "[t]here are very good reasons" to conclude that Congress did not intend the 1984 version of Section 2252 "to apply to exposed but undeveloped film" (Pet. 10). After making their argument to that effect, however, petitioners state that they do not challenge "the questionable holding of the Court of Appeals that, although the 1984 Congress used plain language indicating otherwise, it nonetheless intended to include undeveloped film in the coverage of Section 2252" (Pet. 22). Instead, they argue that, prior to 1986, Congress failed to state its intention to cover undeveloped film with sufficient clarity, and that their convictions therefore offend due process.

Petitioners are wrong. Both the language of the statute and its legislative history demonstrate that the 1984 version of Section 2252 prohibited the transportation of undeveloped film that recorded minors engaging in sexually

explicit conduct, and petitioners were given fair notice that transporting such film was prohibited. Petitioners cite no court decision holding that undeveloped film was not a visual depiction under the 1984 version of Section 2252. Moreover, in 1986 Congress defined "visual depiction" expressly to include "undeveloped film." Pub. L. No. 99-628, § 4, 100 Stat. 3511 (to be codified at 18 U.S.C. 2255(5)). The question whether undeveloped film is a visual depiction therefore will not arise in the future. Accordingly, review is not warranted.

1. The 1984 version of Section 2252(a)(1) proscribed the interstate mailing or transportation of any "visual depiction" if

> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct * * *.

Between 1984, when the term "visual depiction" was added to the statute, and 1986, when the term was specifically defined to include videotapes and undeveloped film, the statute did not contain a definition of "visual depiction." It was clear, however, that exposed but undeveloped film fell within the intended reach of that term. A camera imprints what it captures onto undeveloped film and the image is stored on the undeveloped film until it is reproduced onto a negative, print, slide, or movie film. Whether or not one can see the image while it is stored on the exposed film, the film still contains the image. Thus, exposed but undeveloped film contains "visual depictions" of that which was seen through the camera lens and recorded.[1]

[1]Many forms of developed film, such as microfilm, videotape, and eight-millimeter movie film, are not visible to the naked eye without some form of mechanical, electronic, or optical enhancement. We see no principled basis for distinguishing between developed film that needs to be "processed" through a magnifying projector or a television receiver before it is visible to the naked eye and undeveloped film that needs to be processed chemically before it becomes visible.

As originally enacted in 1978, Section 2252(a)(2) proscribed the interstate transportation or shipment of any "obscene visual or print medium" that was produced by the use of a minor engaging in sexually explicit conduct. Pub. L. No. 95-225, § 2(a), 92 Stat. 8. Section 2253(4) defined "visual or print medium" as "any film, photograph, negative, slide, book, magazine, or other visual or print medium" (Pub. L. No. 95-225, § 2(a), 92 Stat. 8). Plainly, film is a "medium" for producing visual images and "any film" necessarily includes undeveloped film. Consequently, the 1978 statute prohibited the interstate transportation of undeveloped film containing obscene images of children.

In 1982, this Court held that works that visually depict sexual conduct by children are not protected by the First Amendment, even if they are not obscene. *New York* v. *Ferber*, 458 U.S. 747, 764. In response to *Ferber*, Congress amended the federal child pornography statute in 1984 to broaden its coverage by deleting the obscenity requirement. Because written materials retain First Amendment protection, however, Congress further amended the statute to exclude "print medium" from the Act's coverage and replaced the phrase "obscene visual or print medium" with the term "visual depiction." Pub. L. No. 98-292, § 6, 98 Stat. 206; H.R. Rep. 98-536, 98th Cong., 1st Sess. 2-3 (1983). While the amended statute did not define "visual depiction," nothing in the legislative history to the 1984 amendment evidenced an intent by Congress to eliminate any of the types of visual media that were specifically covered in the 1978 version of the Act.

The 1986 amendment to the statute made it clear that Congress did not intend to restrict the types of visual media covered by the statute. In that year, in a clarifying amendment to the Act, Congress defined "visual depiction" as specifically including "undeveloped film and videotape." Pub. L. No. 99-628, § 4, 100 Stat. 3511 (to be codified at 18 U.S.C. 2255(5)). The House Report explained the reason for the amendment (H. R. Rep. 99-910, 99th Cong., 2d Sess. 7 (1986)):

> In the 1984 amendments, the defined term "visual or print medium" (which term was replaced in the offenses by the term "visual depiction") was dropped as a defined term since it was felt that a definition was no longer necessary. The bill defines the term "visual depiction" to include express coverage of undeveloped film and videotape to facilitate prosecutions involving such media, at the recommendation of the U.S. Postal Inspection Service. The Committee intends that any visual depiction of sexually explicit conduct that can be retrieved by electromagnetic, chemical or other means shall also be included in the terms "visual depiction." The Committee approves of the holding of the U.S. Court of Appeals for the Ninth Circuit in rejecting the argument that the term "visual depiction" does not include undeveloped film [citing the decision below in petitioner Smith's appeal].

Thus, the purpose of the 1986 amendment was not to broaden or alter the definition of "visual depiction" as that term was used in the 1984 version of the statute. Rather, the 1986 amendment of the Act simply clarified Congress's intent that the term "visual depiction" had always encompassed undeveloped film. The background of the 1986 amendment therefore supports the conclusion that the interstate transportation or mailing of undeveloped film was prohibited in 1984.

2. Contrary to petitioners' contention, the 1984 version of the statute did not fail to apprise them that the transportation of undeveloped film containing images of children engaging in sexually explicit conduct was prohibited. A penal statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); accord, *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Here, when the entire statutory scheme is examined, there can be little doubt that

Congress did not intend to exempt persons who mail or transport undeveloped film to a photo laboratory for development.

The purpose of the statute was and is the protection of children. As amended in 1984, the statute prohibited producing, mailing, transporting, distributing, and receiving child pornography. Section 2251 prohibited anyone from inducing a minor to engage in sexually explicit conduct for the purpose of "producing any visual depiction of such conduct." Section 2252 prohibited the interstate transportation or mailing of such visual depictions. Petitioners do not dispute that between 1984 and 1986 Section 2252 applied broadly to all forms of visual images, such as negatives, prints, slides, or developed movies. There was nothing in the statute or its legislative history that could have led anyone of reasonable intelligence to believe that Congress meant to exempt from criminal liability the mailing or transporting of undeveloped film to a photo processor for developing. Film, whether developed or undeveloped, is plainly a "visual medium," within the meaning of the term used in the 1978 statute. The use of the term "visual depiction" in the 1984 version of the statute was not accompanied by an indication, express or implied, that Congress meant to narrow the reach of the statute with respect to visual images. And the 1984 statute could not reasonably be construed to be applicable only to visual images in a form that could be easily viewed by the naked eye without any need for processing or enhancement. That construction would have omitted videotapes and movie film, which were plainly within the intended reach of the statute. Undeveloped film, which contains visual images that can be made visible to the naked eye after chemical processing therefore falls within the natural construction of the term "visual depiction." Accordingly, it did not violate due process to apply Section 2252 to petitioners' conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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